IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4604 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MADHUSUDAN DHARSHIBHAI TANK

Versus

A RAJIV CAPTAIN REGISTRAR,

Appearance:

1. Special Civil Application No. 4604 of 2001
MR AR THACKER for Petitioner No. 1
M/S THAKKAR ASSOC. for Respondents No. 1-3

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 13/12/2001

CAV JUDGEMENT

1. Rule. Service of Rule is waived by ld. counsel Ms.Sangeeta Pahwa for M/s Thakkar Associates for the respondents.

2. I have heard ld. Senior Counsel Mr. J.R. Nanavati for ld. Counsel Mr. A.R.Thakkar for the petitioner and ld. counsel Ms. Sangeeta Pahwa for M/s

Thakkar Associates for the respondents. By consent of the parties, this petition is taken up for final hearing today.

3. The petitioner is an Accountant serving with Sainik School, Balachhadi of Jamnagar district and he has been transferred to Sainik School situated at Kunjpura -Karnal in the State of Haryana. It is contended that impugned order of transfer is arbitrary, illegal and without jurisdiction and the same is issued contrary to the contract of service and in violation of rules applicable to the employees serving in Sainik School. Malice is also alleged by the petitioner. It is contended that with a view to take revenge against the petitioner as he has agitated the dispute in the service against the management before the Court, his transfer is made. According to the petitioner, he was appointed as an Accountant in SAINIK SCHOOL, Balachhadi in the year 1981 and thereafter because of some dispute with the Principal Wing Commander Mr. M. Anwar, he was dragged to the departmental proceedings. At the end of departmental proceedings, the petitioner was removed from the service in the month of December, 1988. The order of removaldismissal was challenged by the petitioner by filing Spl.C.A. No. 8233/88 and the same ultimately was allowed vide order dated 4.2.2000 and the petitioner was ordered to be reinstated in service with full back wages and with all other consequential benefits. L.P.A. No. 221/2000 preferred by the School Management also was dismissed. According to the petitioner, his success in litigating and reinstatement as an Accountant in the same School was pinch of salt to management and so it acted malafide and transferred him to a very distant place where he has to serve only for about 2 years. The petitioner has submitted that he is to retire on 31.7.2003 at the age of 55 years. It is however, clarified that the petitioner can get extension in service as per Rule 5.30, but the petitioner does not intend to get extension and want to retire at the age of 55 years.

4. Mr. J.R.Nanavati, ld. Senior Counsel appearing for Ld. counsel Mr. Thakkar for the petitioner has taken me through the contentions raised by the petitioner and the grievances voiced by him before this Court. On 25.5.1981, the petitioner came to be appointed as an Accountant in Sainik School, Balachhadi of Jamnagar district. The petitioner was, at the end of legal battle, reinstated in service somewhere in the month of March 2001 and to be precise on 12.3.2001. Thereafter, he was transferred to a place in the State of Haryana by

way of inter-school transfer. The say of the petitioner is that his transfer is bad on four major counts namely;

(i) Sainik School authorities have no power to pass order of transfer since as per the contract of service, post is not transferable;

(ii) In absence of express condition, the transferring authority had issued the order of transfer which is bad in law and devoid of authority.

(iii) The order of transfer is passed on the wrong interpretation of clause and fact situation stating that Sainik School has, on reinstatement of the petitioner, had two Accountants and, therefore, because of administrative exigencies, the petitioner has been transferred to a place where the post of an Accountant is lying vacant;

(iv) That the order of transfer smacks of malafide.

Mr. Nanavati has also taken me through rules and regulations which are brought into force with effect from 26.3.1997.

5. Resisting the say of the petitioner, the respondents have denied the averments made as to the malafide intention and has submitted that during the period the petitioner was in the legal battle with Sainik School Society, incumbent serving in the Accounts Department was promoted to the post of Accountant and because of his experience in service, was also came to be regularised on the said post. The effect of reinstatement of the petitioner by SAINIK SCHOOL SOCIETY created an administrative exigencies and respondent school cannot continue two Accountants simultaneously in the school in absence of set-up. It is open for the respondent school to transfer one of them. It is open for the employer to select either of the two for the purpose of transfer. The inter-school transfer is permissible and is accepted proposition as per new rules and even as per old circular dated 12.10.1976 issued by the Director (T) & Hon. Secretary, Sainik Schools Society, New Delhi.

6. The backbone of the arguments advanced by Ms. Pahwa is that the post of the petitioner is transferable and transfer of the petitioner is effected as per the express conditions and as per the rules and regulations of SAINIK SCHOOL SOCIETY. She has placed reliance on Rule 5.25 and has submitted that if Rule 5.25 is considered in light of the policy decision taken in the year 1976, then the petitioner can be transferred on administrative exigencies. The transfer is an incident

of service and such employee can be transferred on administrative instructions or administrative grounds as the same is implied condition of service. She has placed reliance on the decision in the case of S.K. Mathur & Others v/s Union of India & Others, reported in 1998(4) SCC 134 and in the case of Sahadeo Narain Chitravansi v/s Chairman Board of Governors, Sainik Schools Society, New Delhi & Others, reported in 1982(1) GLR 149. While hammering the point that "transfer is an implied condition of service", ld. counsel Ms. Pahwa has placed reliance on the decision in the case of State Bank of India v/s Anjan Sanyal & Others, reported in 2001(5) SCC 508, and Gujarat Electricity Board v/s Atmaram Sugnomal Poshani,reported 1989(2) SCC 602 and in the case of B. Vardha Rao v/s State of Karnataka & Others, reported in 1986(4) SCC 131. I have considered aforesaid decisions. She has assailed the arguments of ld. Senior Counsel Mr. Nanavati that transfer is a condition of service only for State employees, but not for the contractual employees by relying on the decision of the Division Bench of the Karnataka High Court in the case of Management of M/s Nippani Urban Co.Op. Bank Ltd., Nippani v/s Workmen of M/s Nippani Urban Co.Op. Bank Ltd., Nippani, reported in 1992(3) SLR 512 stating that said Judgment cannot be taken as base because it has been laid down by this Court in the decision in the case of Sahadeo Narain Chitravanshi v/s Chairman Board of Governors, Sainik School Scoiety, New Delhi & Others (supra) that SAINIK SCHOOL SOCIETY is a "State". According to Ms. Pahwa, principle reflected in para-6 of the judgment supports the case of the respondent school. It is also submitted by Ms. Pahwa that this Court should not interfere with the order of transfer unless this Court feels that the transfer made is prohibited by rules or same is malafide or the transfer is not on account of any administrative exigencies. It is submitted by ld. counsel Ms. Pahwa that in the present case, none of these grounds exist and, therefore, this Court should not interfere with the order of transfer. Age of the petitioner and the fact that he has to retire in couple of months should not be considered as a valid ground for interfering with the order of transfer. Personal difficulty impliedly pleaded by the petitioner cannot be looked and on such ground or on the ground of hardship or family inconvenience, the order of transfer should not be taken under judicial review. She has placed reliance for the purpose on the decision reported in the case of State of M.P. & Another v/s S.S. Kourav & Ors., reported in 1995 (3) SCC 270. So, when transfer is brought before the Court for judicial review, then the Court should not go into the question of hardship and it should be left to the

administration for consideration of a given case. Administration if interested in smooth and efficient administration, then point of hardship would not be given any weightage.

7. In the decision of Union of India & Others v/s S.L. Abbas, reported in 1993(4) SCC 357, the scope of stay of the order of transfer was considered and it is observed by the Apex Court that unless the order is malafide or is made in violation of the statutory provisions, the Court should not interfere. The Apex Court was dealing with the point of hardship agitated by the husband and was relying on the guidelines issued by the Government that husband and wife normally should be posted at the same station. It is an accepted proposition of law that the order of transfer is an incident of government service. Of course, in case on hand, the petitioner has pleaded that in absence of express condition, he cannot be transferred. But it is not a matter of dispute that who should be transferred where is a matter for appropriate authority to decide. Guidelines issued by the government on the subject should be considered and can be considered when the point of absence of administrative exigency or of malice has been pleaded and is brought on factual matrix by the petitioner. The personal bias and/or institutional bias both also can be considered simultaneously, if Court finds that there is an element of pick and chose in transferring an incumbent from one place to another. When a person is transferred to a distant or remote place, then it is obligatory on the part of the Court to examine or to evaluate whether there is hidden element of punishment, especially when point of administrative exigency raised by the transferring authority does not not appear to be well-founded.

8. In the case on hand, the petitioner was appointed in the SAINIK SCHOOL in the year 1981. At a relevant point of time, there were no formal rules for transfer and consolidated rules under which inter-school transfer was introduced are now in force with effect from 26.3.1997. One circular which has an element of regularisation which says that SAINIK SCHOOL SOCIETY was authorised to issue orders for inter-school transfer. Letter dated 12.10.1976 which is at page-92 Annex.I produced by the respondents with affidavit dated 31.7.2001 says that in three different contingencies, inter-school transfer can be effected. It was decided and approved by the Minister of Defence, as Chairman of Board of Governor that there can be inter-school transfer of SAINIK SCHOOL employee on the following three

grounds:-

(i) Where representations have been received for transfer;
(ii) Where the Principal has recommended for transfer; and
(iii) In case of promotion, complaints, availability of vacancies and such other administrative grounds.

9. So, the day on which the petitioner joined services, inter-school transfer provisions were existing. Of course, the appointment order produced by the petitioner is totally silent on the point. The order of appointment produced which is at page-55 colly. does not say anything about the scope of transfer of the petitioner to any other SAINIK SCHOOL. So, it is argued by ld. counsel Mr. Nanavati for the petitioner that the order of appointment in reference to a written acknowledgment which is at page-60 should be considered as a contract of employment and in absence of any express contract, the petitioner cannot be transferred to any other SAINIK SCHOOL. In response to this submission, ld. counsel Ms. Pahwa has pointed out that Clause (8) of order of appointment clearly indicates that rules for order of appointment are subject to any amendment which the Board of Governor may deem necessary from time to time. In absence of express condition of service, transfer is incident of service and it should be given due weightage as implied condition. On this aspect, ld. counsel appearing for the parties have taken me through some decisions which I would like to discuss because the same may go to the root of the disputes raised before this Court.

10. In the case reported in 1982(1) GLR 149, it has been observed and held by this Court that "Sainik School Socitety" is the "State" within the meaning of Articles 12/14 of the Constitution of India. On careful consideration of the order of appointment produced by the petitioner, in special reference to the nature of employment and occupation where the petitioner is working, it transpires that the petitioner was appointed on contractual appointment and in absence of express condition, the petitioner could not have been transferred. The transfer is a condition of service of State employees. Ratio of the decision of this Court reported in 18 GLR 788 that transfer cannot be considered as an implied condition of service, is not a good proposition of law today. It is not necessary to provide for transfer in Recruitment Rules or in appointment

order. Even the decision reported in 18 GLR 788 (supra) also says that the transfer can be an implied condition of service in a case where nature of employment so requires. The petitioner is undisputedly serving in an institution which is a "State" within the meaning of Article 12 of the Constitution of India. The ratio of the decision of the Apex Court reported in 2001(5) SCC P.508 says that the Court can interfere with the transfer order on three grounds; namely (i) if the transfer is prohibited by Rules, (ii) if the transfer is not for administrative exigency, and (iii) if the transfer is malafide. So, it can be said that in absence of existence of any of these grounds, an employee/ State servant can not challenge his transfer. New Rules & Regulations which have come into force with effect from 26.3.1997 can be made applicable to the employees who are in service of Sainik School managed and controlled by Board of Governors of Sainik School Society. Rule 6.24 deals with inter-se seniority of the staff and clause (d) of Rule 6.24 of the Rules says that "each Sainik School has to be treated as a separate unit for the purpose of recruitment, retrenchment and promotion and inter-transfer of employee has to be discouraged as a normal rule." " Rule 6.25 provides for inter-school transfer on mutual consent, but it would not be legal to say that inter-school transfers are only permissible in case of mutual consent. There is an element of scope of inter-school transfer and for administrative exigency, an employee of Sainik School can be transferred irrespective of absence of express condition in the order of appointment. In absence of express prohibitory condition or such specific contract that a particular employee would not be transferable from one Unit to another, one can be transferred. There must be express or implied prohibition as to transfer and in absence of such prohibition, transfer should be considered as one of the conditions of service especially in State employment or its instrumental institutions or such set-up. It can, therefore, be said that employer has inherent powers to transfer the employee unless there is express rule or prohibition.

11. In the present case, this Court is not satisfied on the point that the petitioner has been transferred because of administrative exigency. Undisputedly, the petitioner was appointed as Accountant and was removed from service on the allegation that he has written an anonymous application making serious allegations against the then Principal in the Month of February 1988. The petitioner, therefore, came to be removed from services on 5.2.1988. The petitioner has challenged the order of removal by filing Special Civil Application No.

8388/1988 before this court which came to be allowed by the month of February 2000 (i.e. after a period of 12 years). Letters Patent Appeal No. 221/2000 preferred by respondent no.2 came to be dismissed by the Division Bench of this Court on 11.1.2001. Consequently, the petitioner has been reinstated in service on 12.3.2001. So, the petitioner has been reinstated on the post and place where he was serving on the date of removal. It would not be correct to say that respondent did not want two Accountants in the school. In reference to Rule 5.10.2 of the Book provided to the Court by ld. counsel appearing for the parties (Book of New Rules) shows that temporary adhoc or part-time appointment of staff could be made against a regular vacancy when an employee is dismissed and his dismissal has been challenged in the Court of law or is pending. As per the facts available on record, one Mr. Ashok Sodha who was working with Accounts Department, was promoted to the post of Accountant on 4.5.1991. His promotion was on account of vacancy fallen vacant because of order of removal of the present petitioner in accordance with Rule 5.10.2. Undisputedly, Mr. Sodha was working on the lower post than the post of the petitioner was working and when he came to be removed. The petitioner was holding substantive rank of Accountant and Mr. Sodha was subordinate to the present petitioner, but the department instead of transferring any other Accountant from any other Sainik School, had promoted Mr. Sodha to the post of Accountant on the vacant post of Accountant which had fallen vacant on account of removal of the petitioner. Let me refer the Scheme of Rule 5.10. which deals with appointment made on temporary basis or on part-time basis. It reads as under:-

5.10.1 Appointment of staff will be made only against regular vacancies. Normally all such appointments should also be regular and not temporary or ad-hoc.

5.10.2 Temporary, ad-hoc or part-time appointment of staff can be made against a regular vacancy only if the vacancy against which the appointment is being made is temporary or for a specific period and has arisen on account of any of the following :

(a) Leave including study leave of one month ormore sanctioned to an employee.
(b) Deputation of an employee to another organisation.
(c) Suspension of an employee.
(d) Unauthorised absence of an employee.
(e) Dismissal of an employee which has been

challenged in a court of law or against which an appeal is pending.

(f) Delay in effecting a regular appointment.

(Emphasis supplied)

12. So, promotion of Mr. Sodha can be said to be adhoc or temporary arrangement till the final outcome of the proceedings initiated by the petitioner in the year 1988 by the petitioner qua the said temporarily vacant post. So, on reinstatement of the petitioner, it was open for the department to revert Mr.Sodha to his original lower post or he could have been transferred to the post lying vacant at Haryana as stated in the rejoinder affidavit instead of transferring the petitioner there. Ms. Pahwa, ld. counsel appearing for the respondents has tried to argue that as Mr. Sodha had worked satisfactorily on the post of Accountant for number of years, it was open for the employer to transfer any of these two and merely because the petitioner has been asked to go to Haryana, it cannot be said to be malafide act. It is open for the employer to transfer any of the two Accountants. The order of appointment of Mr. Sodha is not available on record. There is no document available on record to show that who had worked on the post of Accountant between February 1988 and 4th May 1991, the day on which Mr. Sodha was promoted to the post of Accountant. There is no document on record to show that Mr. Sodha was holding a substantial post and not under any ad-hoc arrangement. On the day on which the petitioner was reinstated, he could have been asked to resume at the place where there was vacancy or Mr. Sodha should have been reverted to the original post.

13. I agree that guidelines issued by the Union of India or the policy adopted by Sainik School Society cannot have any force of Rule or Statute. The Govt. Circulars indicating guidelines or policies are simply guidelines and cannot override statutory powers of the authority, but when in the present case the authorities are not even ready to act strictly in accordance with rules and want to continue Mr. Sodha who was promoted absolutely on adhoc basis and by way of stopgap arrangement, cannot legitimately say that there are two Accountants in the said School. There was one and only accountant who was removed and on the strength of the order of the High Court, he was reinstated on the very post. On his resumption of duties, other person working at his place, cannot be said to be working on the said post. Adminstrative requirement shown by the respondent for justification is created contingency and not the genuine one.

14. Undisputedly, the present petitioner is reaching the age of superannuation and normally the person who is reaching the age of superannuation should not be transferred even on administrative grounds. Geographical distance between Sainik School, Balachhadi of district Jamnagar and Sainik School, Karnal (State of Haryana) also cannot be ignored. When transfer of an employee at the fag end of his service career on a created administrative ground is challenged on the ground of malice and non-compliance of the guidelines issued in this regard, such guidelines and deviation whereof would become relevant. I agree that the officer who had removed the petitioner from the service or the officer against whom the petitioner had allegedly made anonymous application, is not the authority issuing the order of transfer, but this is not the case of only personal bias or personal malice, but there is hidden element of institutional bias. It seems that as the respondents have failed and they were compelled to reinstate the present petitioner after several years with all consequential benefits, in couple of weeks or months, he has been transferred to a distant place in last years of his service tenure showing Mr. Sodha as regularly appointed person on the vacant post ignoring Rule 5.10.2(c). It would not be correct to say that on the day of transfer of the present petitioner, there were two Accountants in Sainik School, Balachhadi. Administrative Exigency pleaded by the respondent is not well-founded. On the contrary, this stand taken by the respondents strengthens the case of the petitioner of malice. I have considered carefully the scheme of inter-school transfer, contents of the order of appointment of the petitioner and the scheme evolved for inter-school transfer on mutual consent. It also impliedly gives an impression that there is a scope of accommodation any employee in any of the Sainik School to facilitate a particular employee or the family member of the defence service personnel serving in the Sainik School. The scope kept for such or similar purpose, it seems, has been used for colourable exercise of powers. Institutional bias seems to be the cause of the order of transfer. Mr. Nanavati has rightly argued that the petitioner has been impliedly punished by the employer only because he continued with the legal battle. It is submitted by ld. Senior Counsel Mr. Nanavati that the respondents were not even ready to accept the notice of early retirement made by the petitioner and he was asked to first resume at Karnal, State of Haryana, the place where he was transferred. Mr. Nanavati states that the petitioner will complete 55 years in July 2003 and he is not going to continue in

service after attaining age of 55 years and he is going to opt for an early retirement.

15. I agree that as per the ratio of the decision of the Apex Court in the decision of State Bank of India v/s Anjan Sanyal & Ors. (supra), the Court or Tribunal should not act as an appellate forum to decide transfer of an employee/officer on administrative ground. Question of existence of such administrative ground can be evaluated by the Court or the Tribunal. In the present case, administrative ground shown by the respondents suffers from infirmity and there is no element of exigency. On the contrary, it can be said that the administrative ground put forward by the respondents is the ground created. I also agree that it is for the administration to take appropriate decision and such decision should stand unless same is vitiated either by malice or by extraneous consideration. As discussed earlier, this is case of transfer based on extraneous consideration and there is an element of institutional bias and colourable exercise of powers. So, I would not agree with Ms. Pahwa that in this case, transfer order has been issued on administrative ground and it does not suffer from any infirmity of malice. It is true that only on the ground of hardship or on the ground of non-compliance with the guidelines issued by the Government, same would not by itself, give rise to any malafide or on such count, malafide cannot be inferred. But in this case, malafide is specifically pleaded and has been satisfactorily established by surrounding circumstances and on factual matrix. Thus, in view of the settled legal position propounded in the case of Rajendra Roy v/s Union of India & Another (supra), inference can be drawn which is based on the firm foundation of facts pleaded and established by the petitoner that there is institutional bias, malice in fact and colourable exercise of powers in transferring the petitioner. So, the order of transfer challenged by the present petitioner is of the type which can be taken for judicial review. Inference of malice can be drawn only on the factual basis and not on the basis of conjectures and surmises, but where the court is able to draw inference on the facts available on record, the Court should hold that a particular case is of malice in fact. So, I am not inclined to accept the submission canvassed by ld. counsel Ms. Pahwa for the respondents that this Court should not take the order of transfer under judicial review and no discretionary jurisdiction requires to be exercised in the present case.

16. So, I am inclined to allow this petition. Hence, petition is allowed. Impugned order of transfer dated

21.6.2001 passed by respondent no.1 Principal of Sainik School on behalf of respondent no.2 (Annex.G) is hereby quashed and set aside. The letter dated 12.6.2001 (Annex.I) attached with the affidavit-in-reply which is at page 17 issued by respondent no.3 is also hereby quashed and set aside as prayed in para-19(bb) of the petition.

17. Rule is made absolute accordingly. No costs.

13-12-2001 [C.K. BUCH, J]

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